

1 UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF ARIZONA  
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4 **In Re: Bard IVC Filters** ) MD-15-02641-PHX-DGC  
Products Liability Litigation )  
5 )  
6 ) Phoenix, Arizona  
7 ) October 14, 2016  
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21 **BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE**

22 **REPORTER'S TRANSCRIPT OF PROCEEDINGS**

23 **SIXTH SCHEDULING CONFERENCE**  
24

25 Official Court Reporter:  
Patricia Lyons, RMR, CRR  
Sandra Day O'Connor U.S. Courthouse, Ste. 312  
401 West Washington Street, SPC 41  
Phoenix, Arizona 85003-2150  
(602) 322-7257

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**A P P E A R A N C E S**

Plaintiffs' Co-Lead/Liaison Counsel and State/Federal Liaison Counsel:

Gallagher & Kennedy  
By: **ROBERT W. BOATMAN**, ESQ.  
2575 East Camelback Road, Suite 1100  
Phoenix, AZ 85016

Lopez McHugh  
By: **RAMON ROSSI LOPEZ**, ESQ.  
100 Bayview Circle, Suite 5600  
Newport Beach, CA 92660

Plaintiffs' Steering Committee Counsel:

Gallagher & Kennedy  
By: **PAUL LINCOLN STOLLER**, ESQ.  
2575 East Camelback Road, Suite 1100  
Phoenix, AZ 85016

For Defendants:

Nelson Mullins Riley & Scarborough, LLC  
By: **MATTHEW B. LERNER**, ESQ.  
**TAYLOR T. DALY**, ESQ.  
201 17th Street NW, Suite 1700  
Atlanta, GA 30363

Snell & Wilmer  
By: **JAMES R. CONDO**, ESQ.  
**AMANDA SHERIDAN**, ESQ.  
400 East Van Buren  
Phoenix, AZ 85004

**P R O C E E D I N G S**

THE COURTROOM DEPUTY: MDL case 2015-2641, Bard IVC  
Filters Product Liability Litigation on for 6th case  
management conference.

Will the parties please announce.

MR. BOATMAN: Good morning, Your Honor. Bob Boatman,  
Ramon Lopez, and Paul Stoller for the plaintiffs.

THE COURT: Good morning.

MR. LERNER: Morning, Your Honor. Matthew Lerner,  
Taylor Daly, Jim Condo, and Amanda Sheridan for the  
defendants.

THE COURT: Good morning.

And welcome to folks who are on the phone and in the  
courtroom.

Counsel, I've read the joint status report that you  
all provided, and want to talk through the issues in there. I  
have a question and an observation first.

Did you all work out the additional bellwether cases?  
The issue we addressed last time? Has that been resolved?

MR. STOLLER: Your Honor, the defense made additional  
selections of bellwether cases. Those are proceeding. We  
have our full slate of 48.

THE COURT: Okay.

I also wanted to note for plaintiffs' counsel that

10:02:34 1 there have been some, not very many, but a few attorneys who  
2 have been admitted for purposes of the MDL and have access to  
3 the docket who have been filing short-form complaints just by  
4 entering them in the docket without opening a new case, as  
10:02:51 5 they're required to do. And so what we've done, I don't know  
6 if it's actually happened, but I talked to my staff about  
7 striking those complaints and instructing the attorneys they  
8 have to file those as a case and then they'll be transferred  
9 in to the MDL, rather than just filing them as a new docket.  
10:03:08 10 I think those who have done it have gotten that word or will  
11 shortly.

12 If you could be just aware of that. Obviously, they  
13 need to file that as if it's a complaint even though it's only  
14 a short form.

10:03:20 15 MR. STOLLER: Your Honor, we can send out an e-mail  
16 to at least everybody of whom we're aware, those who have  
17 filed, and those who are in the PLC, reminding them of the  
18 procedure. Obviously, we can't avoid the new folks, but we're  
19 certainly happy to do that.

10:03:32 20 THE COURT: Okay.

21 All right. There are four issues that I see that  
22 you've all raised in the joint status report, and one is the  
23 plaintiffs' request to extend discovery schedule. The second  
24 is the additional depositions that are reviewed in the matrix  
10:03:49 25 in the joint report. The third are the 30(b)(6) depositions.

10:03:52 1 And the final issue is the plaintiffs' request for a special  
2 master.

3 Why don't we start with the 30(b)(6) depositions.  
4 You all indicated there were additional discussions occurring  
10:04:12 5 on that issue. Has any progress been made on the 30(b)(6)  
6 issue?

7 MR. BOATMAN: Your Honor, the way we left it, I  
8 believe, is that we're going to wait the judge's ruling on  
9 both the extension of time and the additional depositions that  
10:04:32 10 will be allowed. To the extent there's no extension or no  
11 additional depositions, it's sort of a moot point.

12 And then beyond that, but assuming they are, that the  
13 depositions are allowed, then we had -- we're going to sit  
14 down and work through the process. They were going to give us  
10:04:56 15 a list of what they thought was reasonable or what the proper  
16 scope would be of the 30(b)(6). We were going to try to work  
17 through that following this hearing.

18 THE COURT: So, Mr. Boatman, I'm assuming from that  
19 you don't think I need to rule on the 30(b)(6) issue today.

10:05:13 20 MR. BOATMAN: No. We haven't really met and  
21 conferred on that, yet, Your Honor.

22 THE COURT: Do defense counsel agree?

23 MR. LERNER: Your Honor, I think that's correct. I  
24 think part of your rulings today may impact 30(b)(6)  
10:05:22 25 depositions, and once we have those rulings we can further

10:05:25 1 discuss.

2 THE COURT: Okay. All right. I will not take any  
3 action on that. If an issue does arise, you can let me know.

4 Let's talk next about the additional depositions.

10:05:41 5 I've looked -- I've read the matrix that you all submitted,  
6 which begins on page 13 of the joint status report which is at  
7 Docket 3636.

8 I think we just need to talk about each one so I make  
9 sure I understand the parties' views.

10:06:14 10 Is that us or --

11 THE COURTROOM DEPUTY: No. That's them. I'm going  
12 to mute them so they can still hear us.

13 THE COURT: That's fine.

14 Starting with Dr. Kaufman, the plaintiffs note that  
10:06:25 15 he was deposed for four hours in 2010 by an attorney who was  
16 not a part of the plaintiffs' steering committee and states  
17 that they want to depose him because he's a principal  
18 investigator in the EVEREST study. I understand, or I'm  
19 assuming, inferring, perhaps, from reading the matrix that the  
10:06:45 20 EVEREST study related to the G2 filter; is that correct?

21 MR. BOATMAN: That's correct, Your Honor.

22 THE COURT: And the plaintiffs note that he's listed  
23 by Bard in state court cases as a witness Bard is going to  
24 call.

10:07:00 25 Bard's view is you have known about Dr. Kaufman since

10:07:03 1 before the MDL, or at least since their discovery responses  
2 many months ago, this isn't the later-generation filters, this  
3 is the G2, and so it's just late in the process to be seeking  
4 to redepose Dr. Kaufman.

10:07:20 5 Would plaintiffs' counsel address that.

6 MR. BOATMAN: Yes, Your Honor. We -- Dr. Kaufman --  
7 we aren't -- they seem to suggest throughout their brief that  
8 we're seeking to extend discovery to take these depositions,  
9 and that isn't the case.

10:07:43 10 What we did with -- a little -- right around a month  
11 to go is we said, Bard, we've worked through our list, here  
12 are the final people -- here are the people that we've  
13 identified.

14 We'd been doing depositions on a rolling basis in a  
10:08:00 15 way that seemed logical to us based upon the documents we had,  
16 the information we had. And so this is a critical witness and  
17 he was someone we wanted to depose, and we told them that with  
18 a month left in discovery. And for this witness, and  
19 effectively every witness, they just said kind of unilaterally  
10:08:19 20 "We're done."

21 And so it's not the basis -- we're not saying we need  
22 to extend discovery for this. We're saying we had time left  
23 in discovery, and this is one of the witnesses we wanted to  
24 depose within that time. And at that point Bard just said,  
10:08:37 25 We're not agreeing to any further depositions and that, you

10:08:40 1 know, we'll take it up here.

2 THE COURT: All right. Since I've got you at the  
3 lectern, let me ask about the other seven, or the other six  
4 reopened depositions.

10:08:54 5 The position on Dr. Venbrux, V-E-N-B-R-U-X, is  
6 essentially the same arguments on both sides that I just  
7 described for Dr. Kaufman. Is your response the same with  
8 respect to him?

9 MR. BOATMAN: It is, Your Honor. There's a little  
10:09:15 10 bit of witness-specific differences, but generally speaking  
11 these are all people that are working for Bard either in the  
12 design, the testing, the promotion of their materials. And  
13 most importantly, Your Honor, they're listing these people as  
14 witnesses.

10:09:33 15 One other point I would add to these witnesses is  
16 these are people that are sort of like reliance on the advice  
17 of counsel. They are witnesses in the case, have been saying  
18 either documents they generated or conversations with them  
19 were part of the decision-making process to not -- to continue  
10:09:56 20 marketing products that we contend were defective. And so  
21 part of the inquiry that we need to ask that's never been  
22 asked is, you know, did they really hold these opinions, and  
23 if they held these opinions, would they still hold those  
24 opinions if they knew what we believe is the whole story, and  
10:10:14 25 did in fact Bard give them the whole story regarding the



10:10:17 1 problems that they knew internally but were not sharing with  
2 the world.

3 And so there's -- the EVEREST study is a very  
4 important study, Your Honor. It's -- the FDA put pressure on  
10:10:30 5 the manufacturers to actually study the failure rates and it  
6 kind of blew up on Bard. They had some conflict with some of  
7 their key opinion leaders, including Dr. Kaufman. We think  
8 that's probably why they're trying to fight so hard on having  
9 some of these people that were on Bard's side not be deposed;  
10:10:49 10 we suspect they're no longer on Bard's side.

11 THE COURT: Dr. Terotola -- no. Trerotola.  
12 T-R-E-R-O-T-O-L-A.

13 MR. BOATMAN: Yes, Your Honor. Same thing. He's a  
14 key opinion leader, has worked as a consultant at Bard since  
10:11:08 15 2001. He's listed as a witness they intend to call at trial.

16 One of the conversations we had with the defendants  
17 is asking them to agree, especially since they're asking us --  
18 or saying we don't get to take their depositions, that they  
19 stipulate that none of the transcripts or documents or -- and  
10:11:25 20 they won't be calling these witnesses at trial, and they would  
21 not make that stipulation. So it seems fundamentally unfair  
22 that they have these witnesses that they list as witnesses  
23 that they agree are important witnesses that they may be  
24 calling at trial, and nobody in MDL is going to have the  
10:11:41 25 opportunity to ever depose them.

10:11:43 1 THE COURT: Dr. Stavropoulos.

2 S-T-R-A-V-R-O-P-O-L-O-U-S [sic].

3 MR. BOATMAN: Yes, Your Honor, same deal. Except in  
4 that case, he had a half-hour examination in 2011 as a  
10:11:58 5 fact-specific witness. So we know very little about the  
6 substance. Again, he's part of the EVEREST study, part of the  
7 Kaufman, Venbrux, Trerotola team. And there's really been no  
8 substantive deposition of him, even by a non-MDL attorney.

9 And, of course, Your Honor, one of the main points  
10:12:19 10 that we've made regarding all of these is their objection to  
11 these is that they've been previously deposed. And they were  
12 very limited, often case-specific depositions, five or six  
13 years ago, and the world has changed dramatically as far as  
14 the information base and theories that the plaintiffs have as  
10:12:43 15 far as questions they would have for these witnesses.

16 THE COURT: Dr. Lehmann seems to be in a different  
17 category. He's been deposed for 11 hours, for seven hours in  
18 2013 by Mr. Lopez. He was also subject to cross-examination  
19 in the Texas action. What's the reason that you think you  
10:13:02 20 need to redepose him in light of that discovery that's  
21 occurred?

22 MR. BOATMAN: Your Honor, two reasons. One is that  
23 there's new information that's came up, especially concerning  
24 the EVEREST study. And secondly, there's been new documents  
10:13:19 25 and new understanding of documents that occurred since his

10:13:24 1 last deposition that we would want -- I don't think we need a  
2 full deposition, but we need a few hours with him to cover  
3 these new materials, the EVEREST study, and some of the new  
4 information that's come to light, especially through  
10:13:42 5 Dr. Kessler has issued a report in one of the state court  
6 cases going to trial early next year, and there's some very  
7 significant issues and opinions in that report that  
8 Dr. Lehmann's never been questioned about.

9 THE COURT: John McDermott, M-C-D-E-R-M-O-T-T, is in  
10:14:06 10 a bit of a different situation. You don't want to redepose  
11 him for discovery purposes, as I understand it, it's that you  
12 think the video of the deposition is not usable in a jury  
13 trial because of what you described as the acrimonious nature  
14 of the questioning and answers. And so you suggested that it  
10:14:32 15 be used only in written form, not in video. The defendants  
16 disagreed.

17 The defendants' response was that the acrimonious  
18 questions were Mr. Lopez's and, in fact that the magistrate  
19 judge took umbrage at the manner in which the questioning was  
10:14:50 20 done.

21 Could you address that.

22 MR. BOATMAN: Yes, Your Honor. I believe Mr. Lopez  
23 identified this problem, this issue, early on in the case, and  
24 that is the issue before us now. Interestingly --

10:15:03 25 THE COURT: I'm sorry, early on in our case?

10:15:06 1 MR. BOATMAN: In our case, yes. I don't know if the  
2 Court remembers, but Mr. --

3 THE COURT: I don't.

4 MR. BOATMAN: -- Lopez, I believe, raised this issue  
10:15:11 5 and this problem before.

6 THE COURT: Okay. I don't remember that.

7 MR. BOATMAN: But in any event, the defendants, I  
8 think, are in agreement with us that the tape is a tape that  
9 is as described. And so we've tried to work through it. We  
10:15:27 10 don't particularly want to have to redepose Mr. McDermott, and  
11 we said our compromise was let's read it to take away the  
12 emotion and the inflammatory portions of it. And they won't  
13 agree to that. I think it's so that we have a video that we  
14 can't use and in effect can't call him.

10:15:56 15 So our position is we'd either like the Court --  
16 either agreement of the parties or the Court to rule that if  
17 they're going to limit us to the pre-MDL deposition, that it  
18 only be read. Or, if they aren't going to agree to that, that  
19 we be allowed to take a deposition that can be used by the  
10:16:16 20 thousand new plaintiffs and the 50 new law firms that would  
21 otherwise be prejudiced by the nature of the acrimony in the  
22 videotaped deposition.

23 THE COURT: Okay. Let's hold off on talking about  
24 the new witnesses. Let me hear from defense counsel on these.

10:16:35 25 MR. LOPEZ: Your Honor, I feel almost compelled to

10:16:37 1 address the Court on the McDermott issue. May I?

2 THE COURT: You may. This sounds like a presidential  
3 debate where somebody says, "I have to respond to that point."

4 MR. LOPEZ: I do because I wasn't expecting to see  
10:16:48 5 this in the pleading. And it looks like -- you know, we had a  
6 full hearing on this with Judge Jones.

7 THE COURT: Pull the mic over, would you.

8 MR. LOPEZ: I'm sorry.

9 What happened -- I wasn't even at this hearing. We  
10:17:02 10 got blindsided by it and there are -- I did bring this to the  
11 Court's attention. There are one or two depositions that  
12 because of the nature of the video or the way the deposition  
13 was taken, I wouldn't expect some of my colleagues to have  
14 deal with that.

10:17:18 15 For the most part the deposition is okay. We read  
16 the deposition at the *Phillips* trial in front of Judge Jones.  
17 There are certain parts of it I'm not particularly proud of.  
18 But the only thing that the magistrate judge saw in the  
19 *Phillips* case was my reaction to about 20 minutes of maybe the  
10:17:36 20 reasons why this had built up because of the nature of the  
21 deposition.

22 So I just don't want the Court to be left with the  
23 impression that I showed up at a seven-hour deposition and I  
24 was nothing but acrimonious and not respectful. I was. I  
10:17:52 25 mean, for the most part, but -- and there are sections of that

10:17:55 1 deposition I'm not particularly proud of, and I brought that  
2 to the attention of the Court.

3 And it's an important deposition. He was the  
4 president of Bard Peripheral Vascular during a very critical  
10:18:09 5 time, during the recovery period, and then when it  
6 transitioned to the G2. He's someone that, frankly, we  
7 probably could have redeposed.

8 The testimony is fine. It's that -- it's a major  
9 distraction in about 15 percent of it, of important testimony,  
10:18:25 10 where I wouldn't want to play because I'm not proud of my  
11 tone, I'm not proud of the way the witness and I are going  
12 back and forth on certain issues, and I don't think my  
13 colleagues or people I represent -- I don't represent, should  
14 be burdened with the jury having an adverse reaction to the  
10:18:46 15 plaintiffs' lawyer not being very professional, to be quite  
16 frank.

17 I'm proud to say that the deposition I took on  
18 Tuesday, which was a seven-hour deposition of a very key  
19 witness, at the end of the deposition the witness said to me,  
10:19:00 20 "Thank you, Mr. Lopez, for being so professional."

21 So, I mean, this just happens to be one of those  
22 depositions where the witness and I did not get along very  
23 well at various parts and I didn't get an opportunity to show  
24 Judge Jones or you, I'm just looking at the fact that the  
10:19:18 25 judge said tell Mr. Lopez to behave.

10:19:22 1 But I just thought it was important for my  
2 relationship with you for you to understand that that was an  
3 exception and not the rule during the deposition. But there  
4 are parts that are important to present to cases in the  
10:19:36 5 future, and I think it's not fair they're not allowed to be  
6 read.

7 If we could just get a stipulation that the  
8 deposition can be read, I mean, this whole -- we don't need to  
9 redepose Mr. McDermott. We're happy with the transcript.

10:19:51 10 THE COURT: Why was it read in the *Phillips* trial, as  
11 opposed to being played?

12 MR. LOPEZ: We were getting near the end of the case  
13 and we had planned to read it anyway and it was just one of  
14 those depositions that we read. I mean, it was -- I chose not  
10:20:06 15 to play the video because there were certain parts of it that  
16 I would have had to remove. I would have taken out important  
17 substantive testimony because I didn't want the jury to be  
18 distracted by me arguing and going back and forth with the  
19 witness or, frankly, my tone in dealing with the witness at  
10:20:23 20 about the five-and-a-half-hour mark of the deposition where I  
21 granted -- I mean, given I was frustrated and I was not as  
22 professional as I should have been under those circumstances.

23 But, again, this is about just doing what's right for  
24 everybody and to make sure that the focus is on testimony and  
10:20:46 25 not on whether or not a plaintiffs' lawyer had ten minutes of

10:20:50 1 not his finest moment in his 35-year career. So I just wanted  
2 to have an opportunity to express that to the Court, and I  
3 appreciate it.

4 THE COURT: Okay. Thank you.

10:21:01 5 Let's hear from defense counsel on these seven.

6 MR. LERNER: Your Honor, Matthew Lerner for the  
7 defense. Would you like me to start with Mr. McDermott first?

8 THE COURT: Your choice.

9 MR. LERNER: Okay. Just for Mr. McDermott,  
10:21:16 10 obviously, after experiencing that deposition, he didn't want  
11 to be deposed again. It's acrimonious. He's also the  
12 president of a publicly traded company. He's now been deposed  
13 twice while he had that position with another company, and  
14 he's also -- it's an apex deposition. You previously  
10:21:41 15 prevented or -- I've forgotten whose motion it was, Bard's  
16 current or former president Jim Beasley, you granted our  
17 motion to not have that deposition go forward on apex grounds.  
18 So Mr. McDermott fought on that same grounds.

19 And then outside of that, just to address the  
10:21:59 20 deposition issue, Mr. Lopez talks about 15 percent of the  
21 deposition not being able to played. That's only 15 percent  
22 of the entire deposition. In order to appreciate the answers  
23 and responses, you really need to have the video to have  
24 context. It's not fair to play the deposition or play -- to  
10:22:16 25 have the deposition read to the jury without having the video



10:22:19 1 and the full context of the deposition to appreciate the  
2 answers and the questioning.

3 THE COURT: Why?

4 MR. LERNER: Because it gives context. Just reading  
10:22:28 5 the plain language without having the context of the actual  
6 deposition helps explain the answers and questioning. It --  
7 just -- reading versus seeing it live is a different  
8 experience, and it's more helpful for the jury to see the  
9 experience that actually occurred.

10:22:49 10 THE COURT: Well, I think what you're saying,  
11 Mr. Lerner, is that video depositions are better than read  
12 depositions for a jury. Which I agree with.

13 The question I guess I have is if 15 percent of the  
14 deposition contains behavior that could be prejudicial to the  
10:23:20 15 plaintiffs, why is it better to show that 15 percent by video  
16 than to read it?

17 MR. LERNER: Are you suggesting that you play some of  
18 the deposition and you play the 15 percent that we can agree  
19 with, the 15 percent?

10:23:38 20 THE COURT: Well, I have had cases where portions are  
21 played and portions are read, in part because you can be a bit  
22 more strategic and focused in what you read. It's harder  
23 sometimes to edit a video and keep it in context.

24 But I guess my thought is if, as Mr. Lopez has  
10:23:54 25 acknowledged, he behaved during portions of that deposition in

10:23:58 1 a way that he thinks could be prejudicial to the plaintiff and  
2 that he is not saying was a good thing, and if it's true,  
3 those portions of the deposition would be distracting because  
4 of the behavior of the witness and/or the lawyer, don't we  
10:24:15 5 solve that problem and eliminate the need for Mr. McDermott to  
6 be deposed again if we say let's read the portions where  
7 there's the distraction so we eliminate that prejudice, and  
8 play whatever other portions you all think the jury should  
9 hear?

10:24:33 10 MR. LERNER: I think that sounds like a reasonable  
11 solution. My only concern, without reviewing what the  
12 portions are, is it could take that out of context, the  
13 behavior -- how the appearance of the witness/questioner being  
14 taken out, in excerpts like that, but I guess in some ways  
10:24:45 15 when you're playing a deposition at trial, you're not playing  
16 the entire thing, so --

17 THE COURT: Yeah, I mean, we never play them  
18 beginning to end. And I'll tell you, I put time limits in  
19 civil cases. I give lawyers specific numbers of hours. I  
10:24:56 20 tell them at noon and at the end of the day how much time  
21 they've used so they can budget it, and it really causes  
22 everybody to be efficient and cut to the chase and just put  
23 the stuff that the jury needs to hear in front of them. So  
24 there's a lot of editing of depositions that goes on.

10:25:11 25 And I think the way to resolve this is to say, number

10:25:16 1 one, we won't redepose Mr. McDermott.

2 Number two, when we get to the first bellwether trial  
3 where he's going to be used, the parties will work to agree on  
4 what portions should be read and what portions should be  
10:25:28 5 viewed.

6 Number three, if you can't agree, I'll make that call  
7 as to what portions will be read and what portions will be  
8 viewed.

9 And the goal will be to give the jury a fair  
10:25:39 10 presentation of his testimony and not prejudice the jury with  
11 some other thing that happened in the deposition. To try to  
12 do it in a way so that the jury fairly understands what he had  
13 to say. And I think that solves the redeposition issue and  
14 the plaintiffs' prejudice issue going forward.

10:26:00 15 MR. LERNER: That sounds like a reasonable solution,  
16 Your Honor.

17 THE COURT: Okay. So that's what we'll do on  
18 McDermott. Let me just make a note here.

19 Okay. Let's hear your thoughts on the other six  
10:26:56 20 we've talked about.

21 MR. LERNER: Your Honor, I'll go through each of  
22 these individually, but I'll note the various doctors have  
23 been known to the plaintiffs even before this litigation, MDL,  
24 was started. They primarily focused on Recovery and G2.  
10:27:17 25 Within the last few weeks before close of discovery, we

1 received subpoenas and notices that several depositions were  
2 going to be noticed for October, I think it was 13th or 14th,  
3 with various doctors who, as I said, it was long ago known to  
4 the parties relating to the Recovery and G2. Many of those  
5 doctors have objected to the subpoenas. The subpoenas have  
6 document requests with them as well that are very broad in  
7 their questioning and requests, and several of the doctors, I  
8 believe Dr. Cohen, Dr. Trerotola, Dr. Stavropoulos have filed  
9 motion to quash in the Eastern District of Pennsylvania. I  
10 believe Dr. Venbrux has filed objection. So some of those  
11 disputes --

12 THE COURT: Which -- which doctors have moved to  
13 quash?

14 MR. LERNER: I believe it's Cohen, Dr. Trerotola,  
15 Dr. Stavropoulos.

16 THE COURT: I don't see a Dr. Cohen.

17 MR. LERNER: He's number 7 on page 20 of this  
18 submission.

19 THE COURT: Number 7 in our list is John McDermott.

20 MR. LERNER: Page 20 --

21 THE COURT: Well, I'm not talking yet about new  
22 witnesses, I'm just talking about the six that Mr. Boatman  
23 discussed. So those are the -- they're now 2 through 6 on  
24 pages 14 through 16. Those are the ones that I think  
25 Mr. Boatman discussed so far. And I'll hear you on the others

10:28:52 1 in a moment, but I think what we ought to do is focus on the  
2 ones Mr. Boatman discussed.

3 MR. LERNER: That's just to point out those issues  
4 may be resolved. There's motions going on with some of these  
10:29:04 5 witnesses that may further delay things.

6 THE COURT: You mean the motion to quash may?

7 MR. LERNER: Motion to quash may. Filed in Eastern  
8 District of Pennsylvania by their attorneys.

9 THE COURT: How long ago were they filed?

10:29:17 10 MR. LERNER: I think they were filed --

11 MR. LOPEZ: There was a deadline, so we spoke to the  
12 lawyers and I think they had to file it by last Friday.

13 MS. DALY: October 7.

14 THE COURT: I will tell you, as you probably know, we  
10:29:36 15 amended Rule 45 two years ago that put a transfer provision in  
16 Rule 45(f), that now says that a judge who get a motion to  
17 quash in the Eastern District of Pennsylvania can transfer the  
18 motion to me for ruling. That was done specifically to deal  
19 with situations like this where there's a nationwide case,  
10:29:56 20 lots of litigation going on, the thought being that one judge  
21 ought to decide what's happening.

22 So if there are motions to quash on witnesses that I  
23 think ought to be deposed, what I would probably be inclined  
24 to do is call the judge and say why don't you transfer that  
10:30:13 25 motion to me so you don't have to worry about it, and I'll do

10:30:16 1 it consistent with the MDL.

2 I only mention that -- it used to be the rule that  
3 the motion -- well, there was a split in the district courts,  
4 actually. But there was a lot of case law that said the judge  
10:30:30 5 in Pennsylvania had to rule on the issue even if the judge in  
6 California who was presiding over the case knew a lot more and  
7 was better situated, and so 45(f) was adopted specifically to  
8 address that situation.

9 So my point is I'm not sure that it's out of my hands  
10:30:47 10 on these witnesses and that we just have to wait for the  
11 motion to quash to be decided.

12 MR. LERNER: Understood, Your Honor.

13 Then going through each of these witnesses, I think  
14 the primary background context of why we're objecting --

10:31:03 15 THE COURT: I'm sorry, Mr. Lerner.

16 As to the six we've talked about so far, which are  
17 Kaufman, Venbrux, Terotola -- Trerotola, and -- Strav- -- how  
18 do you say that? Stavropoulos.

19 MR. LERNER: Stavropoulos.

10:31:23 20 THE COURT: Strav- -- there's an R after the T.  
21 Stavropoulos? Or is that R a misspelling?

22 MS. DALY: It's a misspelling.

23 THE COURT: So it's just Stavropoulos. Okay.

24 As to those four, have there been motions to quash  
10:31:39 25 filed somewhere?

10:31:41 1 MR. LERNER: There's been a motion to file for  
2 Dr. Venbrux, Dr. Trerotola, Dr. Stavropoulos. I'm not sure of  
3 the status of Dr. Kaufman.

4 MS. DALY: Hasn't been served.

10:31:52 5 THE COURT: So the motions to quash are pending for  
6 whom?

7 MR. LERNER: Dr. Trerotola, Dr. Stavropoulos, and  
8 Dr. Venbrux. I think he filed a letter objection but not  
9 actually filed a motion.

10:32:10 10 THE COURT: Okay. And where is the motion to quash  
11 for Dr. -- is Trerotola misspelled as well or is that correct?  
12 Is there an R after the T?

13 MS. DALY: That's correct.

14 THE COURT: Okay. So where is the motion to quash  
10:32:28 15 for Trerotola?

16 MR. LERNER: Both filed in Eastern District of  
17 Pennsylvania.

18 THE COURT: Okay. For Stavropoulos and Trerotola.  
19 Okay. And where is Venbrux located?

10:32:43 20 MR. LERNER: Washington, D.C.

21 THE COURT: Okay. Okay. I've interrupted you  
22 enough. Why don't you give me your thoughts on these doctors.

23 MR. LERNER: Well, I think for Dr. Kaufman and  
24 Dr. Venbrux, along with the other discovery they're seeking,  
10:33:04 25 they've been deposed, there hasn't been -- they were primarily

10:33:08 1 involved in Recovery and G2. They've been -- so they were  
2 well-known to the folks on plaintiffs' side for a long time.  
3 They're medical doctors and busy practitioners as well. So  
4 that's the primary objection to those two people.

10:33:29 5 THE COURT: How about Trerotola and Stavropoulos?

6 MR. LERNER: Those two doctors have been involved  
7 with later-generation products. Our main concern, with these  
8 depositions as a whole, is the number of depositions that came  
9 in late. So we don't have necessarily objections to them  
10:33:48 10 because of their past depositions, but it's more for focus as  
11 a whole for all the discovery that's been requested on the eve  
12 of close of discovery.

13 THE COURT: So let me make sure I understand. As to  
14 Trerotola and Stavropoulos, if there were more time you would  
10:34:09 15 agree they could be redeposed, you're just concerned there's  
16 too many depositions being crowded in at the end of discovery?

17 MR. LERNER: Yes, Your Honor.

18 THE COURT: Okay.

19 MR. LERNER: That brings us to Dr. Lehmann. He's  
10:34:28 20 been deposed, as you noted, seven hours by Mr. Lopez, another  
21 four hours in a case that Mr. Lopez was co-counsel to. He had  
22 the examination in federal court in Texas. He was involved in  
23 Recovery and G2 days. Documents and materials relating to  
24 Dr. Lehmann have been produced even before the MDL began. So  
10:34:52 25 there's really no justification at this late stage to depose



10:34:56 1 Dr. Lehmann yet again.

2 THE COURT: Okay. All right. Thanks.

3 Let's hear from plaintiffs' counsel on the seven  
4 new -- I guess it's six new proposed witnesses on pages 18  
10:35:18 5 through 20.

6 MR. BOATMAN: Thank you, Your Honor.

7 Can I make a comment about the -- as far as the  
8 subpoena process and where we are on the previously deposed  
9 witnesses? I wanted the Court to have the full background.

10:35:34 10 Bard, a few months ago, asked me to instead of  
11 serving subpoenas, to run them through Bard. And Bard has  
12 been very much in contact with these witnesses. Some, they've  
13 turned out not being -- they've been unable to accept the  
14 subpoena. For most of them, they have. We believe that Bard  
10:35:58 15 is behind the effort to quash the subpoena, the subpoenas,  
16 that have been filed.

17 We have talked to the attorney that filed the motion  
18 to quash, I did, and I suggested that the motion be filed with  
19 you for the reasons you discussed. I thought it would end up  
10:36:17 20 here anyway and it was more appropriate for you to decide it.

21 We also agreed to try to work through it, and the way  
22 we left that is we have a conference with the attorneys that  
23 filed the motion to quash next week if we get past the  
24 threshold where the court is going to allow the depositions.  
10:36:37 25 We figured there's no point briefing where it should be

10:36:40 1 briefed and briefing the merits of their motion if the court  
2 wasn't going to allow those depositions. So that's what's  
3 going on as far as the subpoenas and motion to quash.

4 THE COURT: Is that true as to both Trerotola and  
10:36:56 5 Stavropoulos?

6 MR. BOATMAN: It is, Your Honor.

7 THE COURT: One lawyer for both?

8 MR. BOATMAN: One lawyer for both.

9 THE COURT: Okay.

10:37:10 10 MR. BOATMAN: As far as the new witnesses, they're  
11 the six listed on pages 18 and 19. As will become apparent  
12 when Mr. Stoller speaks about the volume of the documents that  
13 were produced and when they were produced, these are the  
14 witnesses that we've identified as the key people on the  
10:37:36 15 later-generation devices that need to be deposed. They've  
16 never been deposed. And almost entirely all of the documents  
17 relating to them have been produced very recently. And so  
18 that was the reason we were going forward with all of the  
19 depositions that we could, that we had the documents for,  
10:37:58 20 which were primarily the earlier generation Recovery and G2.

21 Your Honor, I think by our count, the Recovery and  
22 the G2 make up the majority of our cases, and also a lot of  
23 the issues, even with the later-generation devices, flow from  
24 the problems with those earlier generations. So those are at  
10:38:22 25 issue in even the later generation cases.

10:38:24 1 But in any event, as to these witnesses, again, as we  
2 were looking at the work to be completed before the close of  
3 discovery, we said now that we're either getting the documents  
4 or are being promised to get the documents, many of these  
10:38:44 5 documents for these witnesses still are only produced in the  
6 last week or two. We identified these five or six people as  
7 the people and the discovery we needed for the  
8 later-generation devices.

9 On some of them, as I understand it, I think, Bard  
10:39:03 10 did not have a disagreement that they were people that had  
11 relevant information and should be deposed. I think they have  
12 a couple of differences on that.

13 But generally speaking, it goes back to the overall  
14 objection that, as you articulated earlier, we're trying to  
10:39:22 15 get too many depositions done in the remaining month. And on  
16 that point, Your Honor, I would simply point out they have two  
17 very big, good law firms and we have double track depositions  
18 in this case and we've got the resources on the plaintiffs'  
19 side to do likewise.

10:39:42 20 The only witness that arguably has been deposed is  
21 Kim Romney. Kim Romney was not deposed by us as the filter  
22 manager for later-generation devices, but as the person Bard  
23 put up as a 30(b)(6) designee, and our work in those cases was  
24 focused upon the 30(b)(6) subject matter.

10:40:06 25 THE COURT: What about the assertion in Bard's

10:40:09 1 portion of the matrix that you, plaintiffs' counsel, asserted,  
2 that you were entitled to ask Ms. Romney questions outside the  
3 scope of the 30(b)(6) deposition based on her own personal  
4 knowledge, and, in fact, asked those questions?

10:40:23 5 MR. BOATMAN: I'm sure there were instances,  
6 Your Honor, where we were trying to debate -- you would debate  
7 whether a question was within the scope of the 30(b)(6) or  
8 not, and so I imagine if we went through the transcript there  
9 would be instances where that may have occurred. I can't  
10:40:43 10 represent that it didn't.

11 But I can tell you by and large they weren't taken by  
12 me and I sat in on part of one, but they were on the subject  
13 matter of the 30(b)(6) depositions. One was very narrow, the  
14 REACH Program. One I think was -- I can't remember, maybe  
10:41:02 15 sales and marketing.

16 But the point is, is that we did not treat those  
17 depositions, we did not prepare for or treat those depositions  
18 as the depositions that we would take as the product manager.

19 THE COURT: Okay. Did you have other points you  
10:41:29 20 wanted to make on this group of witnesses?

21 MR. BOATMAN: No, Your Honor.

22 MR. STOLLER: Actually, Your Honor, if I might. I  
23 hate to tag team, but I think this overlaps with  
24 proportionality issues in the case.

10:41:41 25 We have supplied you, Your Honor, with appendix A to

10:41:45 1 the joint report, a list of people who held various positions  
2 at the corporation -- at the two corporate entities here over  
3 the years, and the folks that we identified in these latter  
4 categories and mostly those later generation -- if you don't  
10:42:01 5 mind, I'd like to approach. I've updated that chart a bit to  
6 include information in terms of the documents that have been  
7 produced for these later-generation folks.

8 What you have here, Your Honor, is I've added a  
9 column to what we previously submitted on the right that is  
10:42:24 10 about documents, and it's New, slash, Old, and you'll see  
11 numbers next to the various folks.

12 As you note on what we submitted earlier, we  
13 identified the key positions within these organizations that  
14 related to filters and identified the people who held those  
10:42:40 15 various positions over the years.

16 As you know, we're dealing with 14 years, seven  
17 products, and there's been a fair amount of turnover in those  
18 positions. It's not as if we're talking about a two-year span  
19 of just the Recovery, where they had one president, one VP of  
10:42:54 20 R and D, and one VP of the various departments of the company.  
21 They've had -- because of the number of devices and the number  
22 of years, they've had a number of different people who held  
23 those positions.

24 And as you probably saw from the appendix we  
10:43:05 25 originally provided, we've gone back and started the

10:43:09 1 depositions with the earlier folks, and not deposed the later  
2 folks primarily because we didn't have the documents for the  
3 later devices.

4 What I've given here, Your Honor, and I've  
10:43:18 5 highlighted those folks who are primarily later-generation  
6 devices and primarily and -- with very few exceptions, not --  
7 well, none of them have been deposed in the MDL. Some had  
8 been deposed pre-MDL on earlier devices. For example, towards  
9 the bottom of the page, you'll see I've highlighted  
10:43:37 10 Mr. Chanduszo, who was deposed prior to the MDL on earlier MDL  
11 devices. On the other hand, he's been in that same position  
12 throughout, where he's been one of the primary engineers for  
13 the projects throughout. So he hasn't been deposed on things  
14 like the Meridian and Denali.

10:43:54 15 What I've indicated in the far column, Your Honor,  
16 you'll see are the documents that we recently received on  
17 these folks --

18 THE COURT: What do you mean by "recently"?

19 MR. STOLLER: Primarily starting September 15th. If  
10:44:04 20 it is not noted otherwise, those documents happened and I  
21 can't tell you because we're still processing. I mean, if you  
22 get into the volume of what we've received -- and this, again,  
23 is spilling over into the other issues about what happened  
24 with ESI -- but we received between September 15 and  
10:44:22 25 September 30 approximately -- and I've got the numbers over

10:44:25 1 there -- but let's call it 1.5 million pages of documents,  
2 about 360-, -75,000 documents that we've been able to  
3 determine in that pile.

4 We then received between October 4 and up through  
10:44:40 5 yesterday approximately 1.8 million pages of documents, and we  
6 simply haven't been able to process all of those, I can't give  
7 you precise document counts, but it's in excess of 4- or  
8 500,000 documents. So we have, in total in that period of  
9 time, approximately 3.3 to 3.4 million pages of documents, and  
10:45:03 10 somewhere between 8- and 900,000 new documents.

11 In comparison, Your Honor, in the prior nine months  
12 of this MDL, we had received -- and I don't have document  
13 counts on that -- but about 177,000 documents.

14 So we received in the last 20-something days, and  
10:45:23 15 five times as much as what we received in the entire MDL  
16 before that, and even if you compare it to what had been  
17 produced prior to the MDL, the prior to the MDL was about  
18 433,000 pages -- excuse me, 433,000 documents that had been  
19 produced over the course of years. The last collection for  
10:45:40 20 those, I believe, was 2011.

21 About \$600,000 -- or excuse me, 600,000 documents in  
22 total what was produced before the MDL and in the MDL versus  
23 8- to 900,000 documents produced in the last 20-something  
24 days.

10:45:56 25 So we haven't deposed these folks. What you'll see

10:45:58 1 in the last column is --

2 THE COURT: Well, but, to get to my question, are you  
3 saying that everything in the column on the right has been  
4 since September 15?

10:46:07 5 MR. STOLLER: If you look -- and I was going to  
6 explain. So let me give you an example. The first one is  
7 Mr. Randall, 9,147 documents produced in this last period.  
8 Slash means divides it between old. Nothing before.

9 Same for Mr. --

10:46:20 10 THE COURT: Before September 15?

11 MR. STOLLER: Before September 15.

12 If you go down, you can see an example for Mr. Modra,  
13 who has been around for a while and was the 30(b)(6)  
14 representative for the FDA warning letter, there was  
10:46:35 15 production for him, about 8,000 documents, but he's since had  
16 another 4363 documents that have been produced by him since  
17 September 15.

18 Many of the witnesses, if there's no indication, have  
19 had nothing produced before. You'll see a lot of zeros for  
10:46:48 20 folks that -- where nothing was produced.

21 If you go to the second page, Ms. Romney, there is  
22 the exception I noted, that she had a large amount of  
23 documents produced, but not until August. 56,000 documents  
24 produced in August of this year, just before this bigger  
10:47:05 25 production started.



10:47:06 1 And then you see large numbers for a whole bunch of  
2 folks where thousands, if not tens of thousands of documents,  
3 have been produced for those folks in the last 20-something  
4 days.

10:47:17 5 In terms of proportionality issues as to these  
6 witnesses --

7 THE COURT: Well --

8 MR. STOLLER: I'm sorry.

9 THE COURT: -- let's come back to the six witnesses  
10:47:23 10 Mr. Boatman was talking about.

11 MR. STOLLER: And that's where I was going to head,  
12 Your Honor.

13 The point was on those witnesses, where you're  
14 talking about the corporate folks, what we did is we --  
10:47:32 15 candidly and admittedly, we front-loaded the stuff we knew and  
16 the stuff we had depositions -- stuff we had documents about,  
17 which is Recovery and G2. Most of the depositions in this  
18 case -- and we're unabashed about it -- have been Recovery and  
19 G2, because that's what we had. Those 377,000 documents I  
10:47:51 20 mentioned pre-MDL, all Recovery and G2. The majority of what  
21 we received in the next smaller bit in the MDL, mostly  
22 Recovery and G2.

23 The documents we got now, mostly Meridian, Denali,  
24 and Eclipse. We've not taken depositions on those devices  
10:48:11 25 precisely because we didn't have the materials to do so.

10:48:15 1 Certainly we had some, I'm not going to tell you we had none.  
2 I think they note somewhere in their brief that we had  
3 something along the lines of 25,000 pages of documents related  
4 to the Meridian and G2. I suggest that pales in comparison to  
10:48:29 5 the 3.3 million we just got.

6 Didn't make a lot of sense to go out and start  
7 deposing folks on Meridian and G2 knowing that we didn't have  
8 the vast majority of those documents, because then we'd be in  
9 here coming back to the Court and saying, Your Honor, we need  
10:48:40 10 to redepose those folks because look at all the documents we  
11 got that we didn't have when we went and deposed them.

12 We tried to be efficient about it, which was we had  
13 the documents on the folks -- on the old devices. We deposed  
14 the people who were involved in the old devices where we  
10:48:54 15 needed -- where we had pre-MDL depositions. Where we didn't  
16 need to redepose them, we didn't redepose them.

17 As you can see from the highlighting, the folks we  
18 haven't deposed here are later-generation device folks, and a  
19 number of the folks on the list there are later-generation  
10:49:09 20 device folks, and that's why they're there.

21 THE COURT: Okay. Thanks.

22 Mr. Lerner.

23 MR. LERNER: Your Honor, would you like me to address  
24 from the ESI issues or the witnesses?

10:49:22 25 THE COURT: Whatever they have just talked about, you

10:49:24 1 can address.

2 MR. LERNER: Okay.

3 Specifically for some of these witnesses, and then  
4 I'll talk about some ESI issues that Mr. Stoller raised.

10:49:34 5 For some of these witnesses, several of them relate  
6 to Recovery and G2. The whole premise of this MDL being  
7 formed was because of the need for affirmative discovery after  
8 ten years of litigation related to Recovery and G2, for  
9 additional discovery related to later generation filters.

10:49:52 10 We gave them names of individuals back in February,  
11 pursuant to the Court's order, relating to those later  
12 generation filters. They've never said a word to us that they  
13 were waiting for documents before they started taking those  
14 depositions.

10:50:05 15 And also, before depositions had been taken in this  
16 case, we made those custodians that they've requested do ESI  
17 for those custodians and witnesses produced. So this is the  
18 first time we're hearing that they've waited on documents  
19 before -- and that's the whole reason why they haven't taken  
10:50:23 20 later generation depositions even though the whole focus  
21 of the MDL has been focused on that.

22 In addition, the depositions that have been taken of  
23 witnesses that actually had knowledge of Meridian and Denali,  
24 they still focused on Recovery and G2. So 30 days before  
10:50:41 25 close of discovery, they start bombarding us with all this

10:50:46 1 discovery they want to do about later generation filters. So  
2 that's kind of an overarching issue.

3 THE COURT: Let me ask you a question on the  
4 overarching issue you mentioned just now and in previous  
10:50:54 5 comments, that you were concerned about the number of  
6 witnesses they want to depose in the last 30 days.

7 I think we've all known that the last 30 days would  
8 be busy.

9 On September 28, how many witnesses did they say they  
10:51:07 10 wanted to depose in the last 30 days that you felt was too  
11 many?

12 MR. LERNER: Well, of the 16 plus the 30(b)(6)  
13 depositions? I thought the 30(b)(6) depositions would take  
14 months to prepare people --

10:51:18 15 THE COURT: That's a different issue.

16 So there were -- it's these 16 are the ones that they  
17 identified on September 28?

18 MR. LERNER: Yes, Your Honor. Those 16 included  
19 three 30(b)(6) depositions.

10:51:30 20 THE COURT: Okay. So it was 13 witnesses and the  
21 30(b)(6)'s that they wanted to depose in the last 30 days.

22 Were you surprised they wanted to depose 13 more  
23 witnesses in the last 30 days? If somebody just asked me how  
24 many depositions do I think will occur in the last 30 days, I  
10:51:49 25 probably would have said more than 13 given the fact this is a

10:51:52 1 big case and we're coming to the close of discovery.

2 MR. LERNER: Your Honor, I was surprised -- we were  
3 surprised by the fact that, over time, to coordinate all these  
4 depositions with plaintiffs' counsel and defense counsel and  
10:52:02 5 the witnesses, to get all those depositions coordinated within  
6 a 30-day time frame, especially for doctors that were outside  
7 and had their own attorneys, to get that all accomplished in  
8 30 days, we thought that would be a challenge.

9 THE COURT: Okay.

10:52:22 10 MR. LERNER: Then, I guess, turning to an additional  
11 point about needing the documents that they said they didn't  
12 have. Earlier on in the litigation, even before the MDL,  
13 there were documents that were produced relating to the  
14 later-generation filters.

10:52:36 15 In 2013, we added the words Denali and Meridian.  
16 Eclipse had already been a key word term. We had additional  
17 custodians in 2013 that were part of the ESI. Before the MDL  
18 and as part of responses to discovery in the MDL, from  
19 plaintiffs we produced core materials relating to design,  
10:52:55 20 quality documents, our tracking, TrackWise, database that had  
21 the adverse event report for all the filters. We produced  
22 some marketing materials, design files, regulatory filings,  
23 the official correspondence files. So they had a lot of  
24 information and materials available to them to start taking  
10:53:12 25 depositions early on in the case.

1 THE COURT: Well, Mr. Stoller asserts that since  
2 September 15, they have received something on the order of 8-  
3 or 900,000 documents, most of which relate to these  
4 later-generation filters.

5 Do you disagree with that?

6 MR. LERNER: I agree they've received a lot of  
7 documents over the last -- since September 14. I'm not sure  
8 of the breakdown. I don't think there -- there's all sorts of  
9 documents in there relating to all generation of filters given  
10 the wide spectrum that we had to go through to collect.

11 And if I can give some context for that, Your Honor?  
12 If I may?

13 THE COURT: Yeah, I mean -- I think I know where  
14 you're going on the context and this being shared space. I  
15 know you've been working on discovery terms.

16 What I'm really interested in is, is Mr. Stoller's  
17 assertion that -- and I think I read 25,000 in the report --  
18 that you've asserted there were 25,000 documents, or maybe it  
19 was pages, produced with respect to the later-generation  
20 filters, and his assertion is now there's been hundreds of  
21 thousands of documents and millions of pages produced on those  
22 filters. How do you respond to that comparison?

23 MR. LERNER: Your Honor, that is a bit of a  
24 difference, but I think that part of what's happened here,  
25 too, is, and this is all with the MDL, we talked about ESI

10:54:44 1 from the start and they were critical of everything we did in  
2 the MDL -- before the MDL. They were critical of the  
3 custodians we chose, they were critical of the keywords we  
4 chose. Every part of the process they were critical of.

10:54:55 5 So we cannot just by ourselves just pick custodians,  
6 get key words, and start processing ESI, because the  
7 plaintiffs were opposed to that. We spent time negotiating on  
8 the key terms. We finally got -- agreed upon keyword terms on  
9 September 14. So -- and as a compromise, plaintiffs requested  
10:55:15 10 that we produce those documents by not doing -- primarily no  
11 eyes-on review -- review of those documents. So there's not a  
12 relevance review.

13 So we're getting huge volumes of documents from a  
14 wide spectrum of different sources of data that plaintiffs  
10:55:28 15 requested, and that we acceded to that large volume because  
16 the plaintiffs requested that.

17 So we got their key words very late in the process  
18 finalized. We immediately worked around the clock, went  
19 through six terabytes of data, and processed and produced all  
10:55:45 20 of this information, some of which is going to be irrelevant  
21 because there's not a relevance review.

22 And now, after acceding to what the plaintiffs  
23 actually requested us to do, because they were critical of our  
24 process in the past, now they're using the volume that's being  
10:55:59 25 produced that they requested and demanded, and they still are

10:56:02 1 requesting that we produce more volumes through more testing,  
2 to produce more volumes from the shared drive, now they're  
3 using that against us when they requested that information and  
4 provided us the final key words mid-September.

10:56:16 5 So I think it's a little unfair just to say, Well,  
6 they didn't have some of the this data available when they  
7 were part of the problem in causing that delay.

8 And also, when a deposition was requested of a  
9 specific custodian, they knew later-generation custodians back  
10 in February of this year, if they would have made a request  
11 for those custodians, we would have prioritized those  
12 individuals and produced data for them.

13 So why they waited and focused directed entire  
14 discovery -- and, frankly, we were surprised how much they  
15 focused on Recovery and G2, even with deponents that had later  
16 generation knowledge, they were not being asked questions. As  
17 the footnote in our submission, I think 90 percent of exhibits  
18 that had been used were related to Recovery and G2. The vast  
19 amount of questioning when it relates to a specific filter  
20 relates to Recovery and G2, even with witnesses that had later  
21 generation knowledge. So they've decided to use their time  
22 for the last eight, nine months on the early generation  
23 filters.

24 So that's just kind of -- I'm telling you that's kind  
10:57:22 25 of the response to why we are where we are right now.



10:57:26 1 Do you want me to address some of these specific  
2 individuals?

3 THE COURT: Yes.

4 MR. LERNER: So the plaintiff requested Kevin Boyle  
10:57:35 5 and Scott Randall. Frankly, before I got their list, I didn't  
6 even know who they were offhand. I spoke to Mike Randall, who  
7 has been one of the lead engineers on the filters, I think  
8 since 2008, and he told me that Kevin Boyle and Scott Randall  
9 had very little to do with filters and they wouldn't get much  
10:57:57 10 information from those individuals. So I'm not -- I don't  
11 quite understand why they're requesting those depositions.

12 From Mark Wilson, we -- so then Mike Randall, he does  
13 have information related to later-generation filters, and  
14 we're not opposing his deposition on that ground. We were  
10:58:14 15 opposing doing all the depositions based on the number.

16 Mark Wilson, he was primarily concerned with the  
17 early-generation filters, and that's the reason why we were  
18 objecting to him.

19 Kim Romney, we produced her ESI before her 30(b)(6)  
10:58:32 20 depositions. She's been well-known to the plaintiffs for a  
21 long time. She does have later generation information, and  
22 she was, like I said, deposed twice in a 30(b)(6) capacity.  
23 It was still the focus, the questioning was still on Recovery  
24 and G2, even though they could have asked more about  
10:58:49 25 later-generation filters.

10:58:51 1 For Dr. --

2 THE COURT: Hold on just a minute. Let me make some  
3 notes here.

4 The last statement you made is that when they deposed  
10:59:25 5 Ms. Romney, they could have asked about later-generation  
6 filters, but she was a 30(b)(6) deponent on earlier generation  
7 things; right?

8 MR. LERNER: She was a 30(b)(6) deponent for all  
9 generation filters. The notices, sales and marketing notices,  
10:59:41 10 applied to all generation filters.

11 THE COURT: Okay. Well, what you're saying is that  
12 when they deposed her as a 30(b)(6) repres- -- deposition,  
13 they should have also, when they -- when they deposed her as a  
14 30(b)(6) witness, they should also have deposed her in her own  
10:59:59 15 right?

16 MR. LERNER: I'm saying they had an opportunity to  
17 ask her questions about that and they didn't. To give you an  
18 example of her and many other witnesses, I have a list of  
19 about ten other witnesses that were later generation people,  
11:00:10 20 that they still focused on the Recovery and G2.

21 THE COURT: Well, I guess my concern is if they had  
22 gone for five hours and said, Okay, now we're going to depose  
23 Ms. Romney about her own personal knowledge, we're ending the  
24 30(b)(6) deposition and starting her personal deposition, I  
11:00:24 25 bet a doughnut that you would have objected.

11:00:28 1 MR. LERNER: You are probably correct.

2 Those depositions lasted all day, you know.

3 THE COURT: Okay.

4 MR. LERNER: For Dr. Lynch, he's been another doctor  
11:00:41 5 that's been known throughout this litigation from the early  
6 days of Recovery, I believe that his counsel filed objections  
7 to the subpoena. He's also --

8 THE COURT: You say you believe they have or they  
9 will?

11:00:52 10 MR. LERNER: I think they filed letter objections. I  
11 don't think they filed a formal motion.

12 THE COURT: Okay.

13 MR. LERNER: Then Dr. Cohen. Dr. Cohen also filed a  
14 motion in the Eastern District, but in reviewing Dr. Cohen  
11:01:14 15 last night, I'm somewhat confused because the plaintiffs, in  
16 their submission, note that he's part of the KOL with respect  
17 to Denali.

18 There's a Dr. Cohen that plaintiffs have used  
19 exhibits from, from the Recovery filter days relating to  
11:01:29 20 Temple, and that Dr. Cohen was not involved in the Denali  
21 investigation, and plaintiffs gave that as a basis for wanting  
22 to take his deposition.

23 The Dr. Cohen from Temple that they're talking about  
24 is not a KOL -- recent origin for Bard, and was not involved  
11:01:44 25 in Denali as -- as a Denali investigator, as far as I know.

11:01:49 1 So I'm somewhat confused by their request for  
2 Dr. Cohen and the basis that it's because of his involvement  
3 with the he Denali filter.

4 Your Honor, I would also like to note that all the  
11:01:58 5 doctors that we've talked about, with the exception of  
6 Dr. Kaufman, have independent counsel that were not hired by  
7 Bard. So you have that context for them.

8 THE COURT: Right. Well, as to Drs. Lynch and Cohen,  
9 am I correct in my understanding that neither has been  
11:02:17 10 deposed, at least Dr. Lynch has relevant information about  
11 later-generation filters, the objection you've got is that  
12 it's just too late in the process to be trying to depose him?

13 MR. LERNER: Yes, Your Honor.

14 THE COURT: And Cohen you think, at least if it's the  
11:02:36 15 Cohen at Temple, doesn't have information about  
16 later-generation filters?

17 MR. LERNER: Yes, Your Honor. Not as far as any kind  
18 of relationship he had with Bard. Whether he used Denali  
19 filter I don't know offhand, but he was not -- the Cohen  
11:02:49 20 they're referring to I think is a different Dr. Cohen. The  
21 Dr. Cohen that I think they want to depose and maybe use  
22 exhibits from the ESI from Dr. Cohen is somebody who was  
23 involved in what they call the Temple memo from early 2000  
24 relating to Recovery filter.

11:03:05 25 THE COURT: Okay.

11:03:05 1 MR. LERNER: Your Honor, going back to your question  
2 earlier, you said did I expect to have this many depositions  
3 done. You know, there's been 30 depositions in the MDL over  
4 the last eight, nine months. So now they're wanting to take  
11:03:17 5 16 depositions, three of which, as I've talked about, are  
6 30(b)(6), are extremely broad and would probably take months  
7 to prepare for. That's about a third of the depositions in  
8 this case being taken within the last 30 days. So that's why  
9 we were surprised about that.

11:03:33 10 We were also surprised about how much time had been  
11 taken through all those depositions focusing on Recovery and  
12 G2, when the whole premise of the MDL, as I said beforehand,  
13 was they needed discovery, over ten years of discovery, on the  
14 Recovery and G2 to focus on later-generation filters.

11:03:52 15 THE COURT: Okay. Thanks.

16 Mr. Stoller, it does appear from the interrogatory  
17 answer you received in February that you knew folks who were  
18 involved in the later-generation filters. Why couldn't you  
19 have said, We want to treat them as custodians, we want to get  
11:04:15 20 all of the information quickly that went back and forth  
21 between them because we've got to do discovery about  
22 later-generation filters, and we want to depose them after we  
23 get those documents?

24 MR. STOLLER: Your Honor, there's always a tradeoff;  
11:04:26 25 right? If I could have my cake and eat it too, I would.

11:04:29 1 I will tell you this, that I don't think anybody who  
2 has been in this courtroom in the five or six case management  
3 conferences here so far would say I was not pushing actively  
4 to get the ESI done in this case.

11:04:41 5 The process we went through was a logical and  
6 efficient process, which was we had a large history of  
7 documents that told us about Recovery and G2, and we noticed  
8 up people on those depositions.

9 We sat down and had extensive meet and confers and  
11:04:56 10 conversations with the defense about custodians and  
11 identifying custodians, and exchanged lists that had -- we  
12 started with a large number of custodians, they started with a  
13 small number of custodians, and we sat and had a number of  
14 meet and confers, and all sorts of people who were on those  
11:05:12 15 lists were on our original lists, and people came off of our  
16 lists and people went onto their lists until we came up with a  
17 set of custodians on which the parties agreed.

18 As you'll recall, we had a dispute, not at the last  
19 case management conference but I believe the one before that,  
11:05:27 20 which I think was in June, was in June, about certain  
21 custodians where they would not agree, and you ordered them to  
22 produce those custodians. We didn't get those custodians  
23 until just recently. In fact, we haven't gotten all of those  
24 custodians based on the review I did yesterday with our  
11:05:42 25 vendor.

11:05:43 1           Nonetheless, the point being that, yeah, we had a  
2 list of people who were involved, but if we don't have the  
3 core and underlying documents, simply going and saying, I'm  
4 going to depose Mr. Smith about the Meridian filter and what  
11:05:55 5 he knows about the Meridian, based solely on the documents I  
6 have from his production, is not the way you would you ever  
7 conduct depositions in a case where you have large  
8 repositories of other information about it.

9           You need to -- I mean, I know you practiced, and  
11:06:10 10 practiced well for a long period of time, Your Honor, and if  
11 you knew the defense had, Look, they've got a bunch of  
12 documents here on this issue, I'm not going to just forge  
13 ahead and go depose people on an issue where I haven't gotten  
14 from them the vast majority of their documents, because I  
11:06:25 15 might find stuff in there that doesn't show up in that  
16 witness's custodial file that I'm going to ask him about. But  
17 I'm going to challenge him. It's corporate knowledge that  
18 they knew these things happened about these, even if doesn't  
19 show up in his e-mails.

11:06:36 20           And different folks have different levels and numbers  
21 of documents you get. Sometimes they actively deleted their  
22 e-mails or whatever and so you get a small number of documents  
23 from somebody.

24           It's not an efficient way to go about it because if  
11:06:49 25 we had gone ahead and said, I'm going to notice up -- and

11:06:52 1 let's pick somebody from the list -- let's pick Mr. Boyle,  
2 who, by the way, is and has been the vice president of  
3 research and development for the last three years, over  
4 filters, okay? So he's somebody who would have been involved.

11:07:06 5 If I had said, Produce us Mr. Boyle's custodial file, in July,  
6 and gone ahead and deposed him -- well, let's take a better  
7 example, because they haven't produced anything for him.

8 Let's take Mr. Conrad. If I had deposed Mr. Conrad,  
9 who is the vice president of quality, in July, they would have  
11:07:27 10 given me 574 documents. I suggest and I submit that without  
11 the other 800,000 documents, that's not a very effective  
12 deposition. I would have deposed him for a few hours, and  
13 then come back and said, Boy, you know what, I got somewhere  
14 at the end of September and beginning of October 800,000  
11:07:47 15 documents, many of which relate to the Meridian filter. I now  
16 need to go back and depose Mr. Conrad because I didn't get  
17 very much from him in the first instance.

18 THE COURT: Conrad's not on the list.

19 MR. STOLLER: He's not on that list. I'm using him  
11:08:02 20 as an example of somebody on the corporate structure thing.

21 Your Honor, part of it is we don't know what we have  
22 about folks. I mean, while they identify -- I agree they  
23 identified a number of people, and they have not agreed to  
24 produce custodial files for all of those folks. They have not  
11:08:17 25 agreed to produce as deponents everybody on the list.



11:08:22 1 We have tried to be efficient, and to use a word you  
2 used before, proportional. There are departments and then  
3 heads of departments and people under them. We've identified  
4 over the years five or six engineers who we think are the key  
11:08:34 5 people at different points in time on these filters.

6 There have been, Your Honor, 12, 18, 24 engineers who  
7 have been responsible in some way, shape, or form for filters.  
8 We're not seeking to depose them all. We've been efficient.  
9 We've tried to look at where is the information going to flow?  
11:08:51 10 It's going to flow to the vice presidents who are in charge of  
11 the various departments. It's going to flow to those folks,  
12 the product managers who are in charge of the product over the  
13 years in the marketing departments. It's going to flow  
14 through those folks at the heads of the pyramid on these  
11:09:06 15 various things, and depose those things. Not everybody on the  
16 list.

17 Their argument seems to be, Your Honor, they've done  
18 too much and they've done too little; we gave them this list  
19 of names and they didn't go notice all of those folks up for  
11:09:18 20 depositions and demand all their custodial files.

21 But we asked for a lot of them. But, again, we  
22 focused. We didn't say, Look, everybody who has ever touched  
23 the filter, give us their custodial file. We had long meet  
24 and confers about these issues.

11:09:29 25 We have approached discovery in this case in what we

11:09:32 1 think is the most logical and efficient manner possible, which  
2 is the information we had, the historical documents they've  
3 given us have been Recovery and G2. Unabashedly, we've --  
4 that's the stuff we focused on because that's what we've had.

11:09:46 5 And we have been pushing, as you know and as has everybody who  
6 sat in this courtroom, have been pushing for months on this  
7 other stuff to get it done. But it's not the case where they  
8 said, Well, we can just produce everything at once.

9 I will say this in response to a couple things that  
11:09:58 10 Mr. Lerner said: The focus of this MDL is not on the new  
11 devices. All -- I know that I was not involved in the JPML  
12 stuff, and you know that as well. What I know since we have  
13 been here, we've tracked the case filings, and the case  
14 filings in this case are more Recovery and G2 cases than  
11:10:17 15 Eclipse, Denali, and Meridian. There are 50 -- I don't know  
16 what the number is, but 55-plus percent of the cases in this  
17 MDL are early-generation devices. It's close to half and  
18 half, but not quite. It's a little more in favor of those.

19 We pursued discovery on -- we've been pursuing, and  
11:10:36 20 it is our intention to pursue discovery on all of the devices.  
21 But we haven't been able to do that as to the later generation  
22 devices because we simply have not had the documents and the  
23 files. And I would note it is on page 27 of the submission --  
24 I'm sorry, I looked in the wrong place. That's a different  
11:11:02 25 plaintiff. It's page 12 of the joint report. It's 25,000

11:11:05 1 pages of -- that they produced related to Meridian and Denali.  
2 It's not close.

3 I would like to respond to one other thing, which was  
4 the statement that somehow I was delinquent or we were  
11:11:17 5 delinquent in giving them our list of key terms.

6 THE COURT: Is it true that the key words weren't  
7 finalized until September 14?

8 MR. STOLLER: I believe that's probably true. But if  
9 you'll recall, Your Honor, what happened was, when we were  
11:11:30 10 here on August 23, the last case management conference,  
11 Mr. North came up here and stood at this podium and told you  
12 that he was frustrated, and he was frustrated with their  
13 vendors because they weren't able to get done what they wanted  
14 to get done.

11:11:46 15 I had had a conversation with Mr. Lerner and  
16 Mr. North the day before that conference, and I related to  
17 you, from this podium, that they had come to me and said,  
18 Look, we've hired a new outside vendor, and they identified  
19 him in this courtroom as BDO, and they have a better idea  
11:12:00 20 about the way to deal with the ESI in this MDL, and they think  
21 that there's different terms that have better strengths in  
22 different departments. So if you look at the sales marketing  
23 department, we should use these terms, and if we go to the  
24 quality assurance department we should use these terms. And  
11:12:17 25 if we worked with management, we should use these terms.

11:12:19 1 Rather than having one set that we apply to everything, we  
2 think we can be more focused.

3 I said, Great. I wish we had this conversation six  
4 months ago, but let's talk about it. And I met with them and  
11:12:31 5 their vendor the very next day, August 24, after the last case  
6 management conference. And at that meeting they showed me --  
7 they didn't give me handouts, but they showed me on their  
8 computers, Look, we have these graphs that show all these  
9 things and these different strengths, and they didn't -- I  
11:12:45 10 said, Great, make me a proposal. Tell me what it is you're  
11 proposing and let's talk about it, but we to have get rolling.

12 I didn't get that proposal until the weekend. And at  
13 that time they said, You know what, we don't want to do  
14 department by department anymore, we want to do this key term  
11:13:04 15 list where we say, A plus B plus C plus D, up to I think they  
16 wanted 14 key terms or something along those lines.

17 I said, Wait a minute. What happened to the  
18 departmental by departmental? You were selling me on this is  
19 going to be more efficient, we're going to be more focused.

11:13:22 20 And I was told, No, the vendor's changed their mind,  
21 they don't want to do that anymore.

22 I said, Okay. Well, then tell me what are the  
23 efficiencies of these -- now you're making a proposal. You're  
24 giving me a proposal. Tell me what the efficiencies of these  
11:13:34 25 terms are because it looks to me by the way you have in that

11:13:37 1 list of 14 some pretty inefficient terms, like venous. If you  
2 pick 14 terms, venous is not one of the 14 I would pick.

3 For disclosure, Your Honor, venous, I think, was a  
4 product name for one of the later-generation filters.

11:13:52 5 But based on the information they gave me, and they  
6 did it additively, they said if you add this term you get this  
7 many more responsive documents out this many more total that  
8 are pulled in by it.

9 And I said, Some of these, based on your own  
11:14:04 10 calculations, the numbers you're giving me look like they're  
11 bad terms and they're not doing what you want them to do, tell  
12 me why you're doing this.

13 And we had that -- and that conversation happened  
14 between, I would say, between September 2 and September 14.

11:14:16 15 In that period of time we agreed they could reduce collections  
16 on a number of different areas and said you don't need to  
17 collect from these areas at all. We agreed you don't need  
18 to -- in terms of e-mail addresses, that you don't have to  
19 collect anything that has these domains. You know, something  
11:14:31 20 that comes from @costco. How do we help reduce what you all  
21 have to do?

22 And at the same time, we had several discussions back  
23 and forth. And ultimately, although previously I think that  
24 the number of key terms had been something in the order of  
11:14:43 25 neighborhood of 40 to 45 key terms, we said, Here, we'll take

11:14:48 1 your original 14, substitute out a couple that looked bad, add  
2 in these and we'll just go with this.

3 Why? Because we need documents. It's -- this  
4 process has been inefficient. What we're going to get is a  
11:15:02 5 lot of documents that we now -- we have to sift through. I  
6 have been talking and suggesting and proposing since the  
7 outset of this that we go and do a cull using some predefined  
8 key terms, and then we apply predictive coding to it and come  
9 up with a set.

11:15:17 10 I proposed that months ago, at the outset of this  
11 litigation. We're now nine months in or whatever we are now,  
12 and we're going to do it on our end. Basically I said just  
13 get me the stuff, and we'll run it on our end. We'll incur  
14 the cost and do it just in order to get things as quickly as  
11:15:33 15 possible.

16 The implication that the delay has been on our side  
17 is -- I will characterize it as frustrating from my  
18 perspective, Your Honor. I have been trying everything  
19 possible to get this done as quickly and efficiently as  
11:15:45 20 possible.

21 We are now in a position where I am nine months into  
22 the litigation and I've had 100,000, 150,000 documents  
23 produced up to ten days or 12, 14, 21 days ago, and I now have  
24 900,000 documents I've got to get through, most of which have  
11:16:02 25 to do with these later generation folks. Necessarily.

11:16:05 1 Because the collections we did for custodians were two things:  
2 Refreshes of people who had previously been collected -- in  
3 other words, their stuff had been collected in the past, now  
4 we're getting the new stuff for folks who have been there or  
11:16:17 5 folks who left and there hadn't been collections after they  
6 had left.

7 Or new custodians. And primarily the new custodians  
8 are the folks that are on those lists of people who have been  
9 dealing with the new devices. That's what we're getting now  
11:16:31 10 is all the stuff -- the idea that, Well, we should have just  
11 gone out --

12 The third thing is the shared -- the shared drives.  
13 I don't know what's there, Your Honor. I'll tell you we've  
14 only begun to process it. We -- it takes our vendor a number  
11:16:44 15 of steps we have to get to before we can even start laying  
16 eyes on stuff. I don't know what's there.

17 They have claimed that they made this -- productions  
18 from those shared drives in the past. I asked that the stuff  
19 be de-duped. My assumption, then, is what I'm getting is  
11:17:01 20 primarily new materials.

21 We haven't deposed those folks later in the list,  
22 later in time simply because it -- it never made sense to do  
23 so. It would not have made sense to just start randomly  
24 identifying folks and saying, Give us these folks, give us  
11:17:14 25 their custodial files, because there's a whole host of

1 underlying documents relating to these devices that we didn't  
2 get until just the last -- you know, in some cases yesterday,  
3 and we're still receiving some of that stuff I think in the  
4 mail today.

5 THE COURT: Let me ask you a couple of questions,  
6 Mr. Stoller, that relate more to your request for more time  
7 than to the specific witnesses we've been talking about.

8 And these questions are in response to the specific  
9 proposal you've made for extending the schedule in this  
10 litigation, which is on page 5.

11 You indicate that once you get through the documents  
12 you're going to need ten to 12 weeks to conduct depositions.  
13 Are those depositions in addition to these 13 we've been  
14 talking about today?

15 MR. STOLLER: Your Honor, I'm going to tell you I  
16 don't know what I don't know.

17 THE COURT: I know you don't. But is that -- are you  
18 setting aside the ten or 12 weeks for other witnesses besides  
19 these 13?

20 MR. STOLLER: I think some of these 13 can go  
21 relatively quickly. Some of those folks have, for example,  
22 the doctor -- and I'll -- Mr. Boatman can speak more to this,  
23 but I think -- and this is not in my bucket, but I think that  
24 something like Dr. Venbrux or Dr. Kaufman, perhaps to some  
25 degree Trerotola and Stavropoulos might be able to go sooner.



1 I think somebody -- some of these other folks, though, if you  
2 look at like Kevin Boyle or Scott Randall or Mike Randall, who  
3 have been in the trenches and dealing with the  
4 later-generation devices, look, if you put -- if you put a gun  
5 to my head and say, Paul, you got to depose them, I'll do  
6 whatever anybody tells me to do. I think it would be  
7 inefficient to go depose those folks in the 20 days, and  
8 then --

9 THE COURT: That's not really what I'm asking.

10 MR. STOLLER: Okay. Apologize.

11 THE COURT: What do you need ten to 12 weeks for?

12 MR. STOLLER: Well, let me start at the outset what I  
13 need to do. We're now processing --

14 THE COURT: Why do you need ten to 12 weeks for  
15 depositions? That's my specific question.

16 MR. STOLLER: It's -- for some of these folks and for  
17 the unknown. It's the unknown, Your Honor. I don't know what  
18 I'm going to get until I get into it. The idea there was,  
19 look -- and let me tell you how I came up with the proposal as  
20 the architect of the proposal. I said -- I just -- this is  
21 like getting a new case. Any time you get this many  
22 documents, it's like the start of a new case.

23 If you said, Paul, you've got to figure out your  
24 discovery on these devices as of today and go depose witnesses  
25 based on almost a million documents, what are you going to do?

11:20:06 1 And I'm going to put you on short schedule. I would say,  
2 Judge, I'm going to do exactly what I proposed here: I'm  
3 going to go out and I'm going to rapidly get through those  
4 documents as quickly as possible, and then start scheduling  
11:20:17 5 depositions in a short period after.

6 How long I would need, and if -- if this were  
7 something different, I'd be talking months and months. What I  
8 did, though, was I looked at the bellwether schedule,  
9 Your Honor, and I said assume none of this happened, when are  
11:20:28 10 we going to be trying cases in the bellwether cases so that if  
11 none of this happened, we were just going to go forward with  
12 that schedule.

13 And under the bellwether schedule, Your Honor, we are  
14 due to exchange our ten picks each out of the 48 on the 9th of  
11:20:45 15 December. We are due to submit to this court on the 16th of  
16 December a list of 12, if we can. If not, it will be each  
17 side picks four, and then we'll submit to you four.

18 You'll then pick those cases that are going to be the  
19 Discovery Pool 1. And at the same time we're supposed to put  
11:21:04 20 in place -- and I say "we." I mean we collectively -- a  
21 scheduling order for those cases for the individual case  
22 discovery.

23 And I looked at that and said, Okay, if we're start  
24 of discovery January 1, let's assume things go smoothly and we  
11:21:19 25 have our 12 discovery pool cases starting January 1, and we're

1 going to start discovery on them, we're probably going to do  
2 four months of case-specific --

3 THE COURT: Well, but the schedule you proposed has a  
4 us picking the bellwether trials on March 1st.

5 MR. STOLLER: Has us --

6 THE COURT: Picking the six bellwether cases to go to  
7 trial on March 1st.

8 MR. STOLLER: In the existing bellwether order?

9 THE COURT: Yeah.

10 MR. STOLLER: I'm sorry, I don't have it in front of  
11 me.

12 THE COURT: It's Section 5. Comes right after the  
13 discovery group. We pick the -- we -- the language you  
14 proposed says the initial bellwether cases for trial will be  
15 selected from Discovery Group 1, and by March 1st, you give  
16 them to me. By March 5th, you get some additional  
17 information, and I then pick the cases for trial.

18 So I've been operating the under the assumption that  
19 we're picking cases to go to trial in March, which is very  
20 different from the schedule you just talked about.

21 MR. STOLLER: But it won't be necessarily -- and I  
22 think that's one of the things we'll have to work out, is that  
23 doesn't necessarily mean we won't still be taking discovery in  
24 those cases. You're going to have fact-specific cases --

25 THE COURT: How are we going to pick bellwether cases

11:22:30 1 when discovery hasn't finished? I thought the whole idea of  
2 the discovery group was you can figure out the cases so you  
3 can decide which ones you want to try.

4 MR. STOLLER: Your Honor, I don't disagree with you,  
11:22:40 5 and all I can say is that perhaps Mr. North and I didn't think  
6 this through, but let me tell you where I think the reality  
7 is. Let's talk about what it would look like. Pretend for a  
8 moment they didn't exist here.

9 If we're at December 31, January 31, and we've got 12  
11:22:53 10 cases and we've got to take discovery in those cases, I'm  
11 going to suggest that given the number of witnesses, you're  
12 going to have planning physicians, ex-planning physicians,  
13 treating physicians, plaintiff, perhaps family members if they  
14 want to take those depositions. Then you'll have potentially  
11:23:12 15 sales reps from the -- that dealt with the particular doctors.  
16 And what we've seen in state court cases is let's call it six  
17 to 12 depositions in each case during the fact discovery  
18 period. Over 12 cases at the same time.

19 THE COURT: So what were you all thinking when you  
11:23:31 20 said we'd be picking the six for trial in March?

21 MR. STOLLER: I'll be honest, Your Honor, I don't  
22 remember it. I'm not going to throw Mr. North under the bus  
23 because he's not here, but it was their proposal. It seemed  
24 reasonable to me at the time. I honestly didn't think this  
11:23:46 25 through in that sense of what we're going to have to do for

11:23:49 1 discovery in these cases.

2 My sense is, again, we're going have to six to 12  
3 individual depositions in each of the 12 cases. We're going  
4 to have case-specific experts in each of the cases. To me,  
11:23:59 5 that schedule runs you out to the end of July or August in  
6 terms of discovery and expert disclosure in those individual  
7 cases.

8 THE COURT: Well, I understand what you're saying.  
9 It just seems quite inconsistent with Case Management Order  
11:24:14 10 Number 11 --

11 MR. STOLLER: I don't disagree with you,  
12 Your Honor --

13 THE COURT: -- that we have entered in the case.

14 MR. STOLLER: -- and I'll fall on my own sword here  
11:24:22 15 and say I don't remember thinking about this issue. I didn't  
16 think -- I can say I didn't. I didn't think about this. I  
17 didn't think about what does the discovery schedule look like  
18 in those cases. And we kind of punted on it because I was  
19 more focused on the selection process of getting us down to  
11:24:37 20 discovery pool.

21 I will tell you in my own mind I hadn't gone back and  
22 looked at that portion of the order. But I've been thinking  
23 for several months we would be looking at trials in October or  
24 November because my anticipation was it was going to take you  
11:24:49 25 us six, seven, eight months of case-specific discovery on

11:24:53 1 those cases just by virtue of the number of witnesses you're  
2 going to have. And we'll have 12 going at the same time, and  
3 your minimum number of witnesses is probably five or six. And  
4 depending upon how many treaters they've had and how many  
11:25:05 5 folks were involved in the sales rep side.

6 Again, experience of the state court cases we have  
7 that have been going on contemporaneously is that you're going  
8 to have six to 12 depositions per case, then you're going to have  
9 individual case-specific experts to talk about their damages  
11:25:21 10 and particular physical issues.

11 THE COURT: Okay. I understand what you've said.

12 MR. STOLLER: So my perspective on it, Your Honor,  
13 was working back --

14 THE COURT: I know what your perspective is, you've  
11:25:29 15 explained it in the memo as to how you then came up with the  
16 four months of additional general discovery. So I understand  
17 that.

18 MR. STOLLER: Okay. I'll sit down unless you have  
19 specific questions for me.

11:25:40 20 THE COURT: No. That's fine. Thanks.

21 MR. STOLLER: Thank you, Your Honor.

22 THE COURT: Let's hear from defense counsel.

23 We need to wrap this up by noon, and I want to make  
24 sure we have time to talk about the special master, too.

11:25:50 25 MR. LERNER: Your Honor, do you have any questions

11:25:52 1 for the bellwether process at all?

2 THE COURT: Well, yeah, you might be able to tell.  
3 What is your thinking for us picking the Discovery Group 1 in  
4 December and the six bellwether trial cases in March, which is  
11:26:07 5 the proposal I thought looked pretty efficient and I adopted.

6 MS. DALY: Your Honor, I think we're on target to be  
7 able to do the narrowing from the 48 to the 12 by December the  
8 9th. The only thing we agreed to do for discovery to narrow  
9 the 48 to the 12 was to get medical records.

11:26:23 10 THE COURT: Right. I know that's done. I'm looking  
11 at the December to March period when you were going to get  
12 from the 12 in the discovery group to the six bellwether  
13 trials.

14 MS. DALY: I was very involved in the discussions of  
11:26:34 15 the bellwether. It was not our impression that we were going  
16 to have to do a scorched earth discovery on every treating  
17 doctor, spouses, and everything else in the 12 cases to be  
18 able to pick six. That we would go to six and we would have  
19 some remaining discovery to do that was case specific, but  
11:26:53 20 that was fully accomplishable --

21 THE COURT: What did you think would be done --

22 MS. DALY: -- to get from the 12 to the six.

23 THE COURT: What did you think would be done on the  
24 12 between mid-December and March 1st?

11:27:03 25 MS. DALY: Likely an implanting doctor, the plaintiff

11:27:06 1 herself or himself. If there was an unusual medical condition  
2 for that -- for that particular plaintiff we might take a  
3 hematologist, for example. And, really that's what my  
4 expectation was.

11:27:20 5 Our expectation was not, for example, that we would  
6 have case-specific medical experts in the 12 cases deposed  
7 yet, but that would wait until we got to the final six, and we  
8 would be able to accomplish this on the schedule that we've  
9 provided.

11:27:36 10 THE COURT: Okay. Thank you.

11 MR. STOLLER: Your Honor, might I note just in  
12 response to that, I don't know that we would be averse to  
13 that, but it doesn't change the timing, because whatever the  
14 six are that are going to be picked for trial, they're still  
11:27:47 15 going to have to undergo full discovery even after that.

16 THE COURT: It does change the timing. If we pick  
17 those in March, we can have them ready for trial by June.

18 MR. STOLLER: If we picked six cases in March and had  
19 to do individual fact discovery and individual expert  
11:28:06 20 discovery, do you think we'd be ready for trial in June?

21 THE COURT: I think you could.

22 Did you ever practice in Judge Bilby's court?

23 MR. STOLLER: Despite the little gray I have and the  
24 very little hair I have, that would -- I did not. I heard  
11:28:23 25 stories.



11:28:24 1 THE COURT: If you had, you would know it was doable.

2 MR. STOLLER: Let me add this, Your Honor --

3 THE COURT: I understand your point. I'm not trying  
4 to make light of it. But I learned from Judge Bilby, as a  
11:28:37 5 lawyer in his court, that things can happen much more quickly  
6 than lawyers usually think, and can happen well and a fair  
7 trial can occur.

8 All right. Let's go back to defense counsel. I want  
9 your thoughts on what Mr. Stoller said in response to the  
11:28:54 10 assertion from defendants that the problem has come because  
11 the plaintiffs didn't get you their search terms until  
12 September 14.

13 MR. LERNER: Your Honor, throughout the process we've  
14 talked about various keyword terms and other processes  
11:29:13 15 pre-ESI. But everything that we were proposing, we weren't  
16 getting anywhere. So by September 14, we got their keywords  
17 they would agree to, plus they added a bunch of what they call  
18 fuzzy words, and we finally had a list that we could use to  
19 start producing from all the ESI.

11:29:34 20 THE COURT: You do agree, I assume, some of delay and  
21 the problem was as a result of your change of vendors when you  
22 discovered in August that your first vendor wasn't doing  
23 things right.

24 MR. LERNER: I agree with that, Your Honor.

11:29:51 25 THE COURT: Okay.

11:29:52 1 All right. What I want to do on the schedule issue,  
2 and that will affect my decision on the depositions, is I want  
3 to think about what you all have told me. I want to go back  
4 and look at the overall schedule and the bellwether schedule  
11:30:08 5 and make a decision about what adjustments ought to be made in  
6 light of what all has been said. I think I understand the  
7 parties' positions.

8 Mr. Boatman, was there something else you wanted to  
9 raise?

11:30:25 10 MR. BOATMAN: No, Your Honor.

11 THE COURT: Okay. On the special master issue, I  
12 will tell you that I have seen a special master in a  
13 deposition one time when I was a summer associate in 1978 in  
14 New York City. And in 20 years of practice and 13 years on  
11:30:46 15 the bench, I've never seen it done again. So it's -- at least  
16 from that limited sampling, it's a pretty rare event.

17 I guess a question I have so that I can give this  
18 fair consideration is I couldn't tell from your papers whether  
19 you want a special master who is in Phoenix, or some other  
11:31:13 20 city, that you can call in the middle of a deposition if you  
21 have a problem, or if you want a special master sitting in  
22 every deposition and ruling on problems as they come up.

23 MR. LOPEZ: Well, the short answer, Your Honor, would  
24 be anything that helps the process. And I know it's unusual  
11:31:38 25 that we've taken this many depositions and now we're bringing

11:31:41 1 to the Court's attention some of the issues we've had and the  
2 need for a special master.

3 I will say this: The deposition that happened on  
4 Tuesday of a very important witness, and I mentioned that  
11:31:54 5 deposition earlier, I think that the mere fact that both sides  
6 knew that Judge Campbell was available at noon, and then again  
7 at 3 o'clock or whenever it was you gave us the time, seemed  
8 to help a lot.

9 So we don't want to have to incur the costs of a  
11:32:14 10 special master. I would say my experience is different than  
11 Your Honor's in that in most MDLs, at least that I've been  
12 involved in, and we've had the special master that attends  
13 depositions, even if we have to pay the expense of that  
14 special master going to Amsterdam, London, or wherever it is  
11:32:31 15 these depositions are being taken.

16 I think Your Honor will see from the transcripts that  
17 we showed what some of our concerns are. Our concerns are we  
18 just want to be able to get responsive testimony from  
19 witnesses. And if there's disagreement about that, and I know  
11:32:50 20 there are disagreements about that, I don't want to have -- we  
21 don't want to have to come and say, Judge, we didn't get a  
22 fair shake at taking this witness' deposition, we would like  
23 you to give us another two hours, sanction the other side, and  
24 then we come in here and fight. I mean, I know that's  
11:33:06 25 something Your Honor doesn't want us to do, and I think we've

11:33:10 1 avoided that to this point, and I think we want to continue to  
2 avoid those issues.

3 So, you know, would it be preferential to have  
4 someone travel around with us? Probably. Practical?

11:33:26 5 Probably not. Especially now that we're near the end and we  
6 are already trying to squeeze, I think, a lot of discovery and  
7 depositions into the last whatever time Your Honor's going to  
8 give us.

9 We're looking for ideas and maybe options that you  
11:33:37 10 can give us to have someone available who is not Your Honor,  
11 because we know you have a busy docket and -- and, you know,  
12 we're at deposition in New Jersey and you're in the middle of  
13 a trial and we and we need something to be resolved because  
14 we've -- you know, we've got an example like some of the  
11:33:53 15 examples we have shown Your Honor, that we'll ask a question  
16 nine times and we don't get an answer, would you please -- and  
17 we've done that before. I've done that before in one-off case  
18 and in MDLs where we've called the judge and got him on the  
19 phone, or called a special master, spent ten minutes having  
11:34:11 20 the court reporter read the transcript, and the judge or the  
21 special master says, That's okay, the witness can do that, or  
22 Mr. or Mrs. Witness, stop doing that, I'm going to sanction  
23 you if you continue to do that.

24 So if there's a process like that that works, where  
11:34:30 25 we can have someone available, I think just the threat of that

11:34:35 1 helps both sides.

2 In other words, if they think certain lawyers are not  
3 behaving or we think a witness is not appropriately responding  
4 to questions, we want to be able to use these for trial.

11:34:50 5 These are -- almost all of them are trial witnesses that are  
6 going to be used in video or read or -- you know, trials all  
7 over -- in here. I mean, some of these witnesses are not  
8 Arizona witnesses. I mean, they're witnesses and they plan to  
9 play some and we plan to play some.

11:35:06 10 And I'll just be frank, we don't think we're getting  
11 a fair opportunity in the time we're allotted to get full and  
12 complete and accurate and responsive testimony in many  
13 instances. It's not every witness. But it's a lot of them,  
14 and it seems to be a pattern of what we get.

11:35:24 15 In other words, you ask a simple question and we hear  
16 kind of the same theme that resonates in some of what we call  
17 speeches. We hear about all devices have problems. Or all of  
18 a sudden the FDA will enter into an answer. Or that, you  
19 know, I know that Bard did everything they were supposed to  
11:35:48 20 do. Just -- you know, I mean, we've shown you some examples.  
21 And those are not isolated examples. They happen at every  
22 deposition at various degrees.

23 It happened on Tuesday with this witness. But it  
24 didn't happen enough where I thought we needed to call you.  
11:36:04 25 We worked through it, and I stayed on -- on some of the

11:36:07 1 questions until I got an answer, and it wasn't time after time  
2 after time.

3 So long answer to a short question, but -- and I  
4 guess my response to it is whatever we can do to ensure that  
11:36:24 5 future depositions, including the many experts we have to  
6 take, maybe even some of the treaters in the bellwether  
7 process and certainly some of the additional witnesses we want  
8 to depose, we just get good, clean testimony like we would if  
9 we were here. If you were sitting there and the witness was  
11:36:40 10 there and we were here asking questions. Because that's the  
11 way depositions are supposed to go, and we just don't believe  
12 they have been. And this has been happening, at least prior  
13 to the -- prior to this MDL.

14 Your Honor, if you don't mind, while I've got the  
11:36:56 15 opportunity, I know you want -- the one thing I want to make  
16 sure the Court has perspective of is how we are state, federal  
17 coordinating this MDL and what we're doing. There's a case  
18 that's going to trial, probably in the first quarter of next  
19 year. It's a G2 case. And we've coordinated these  
11:37:16 20 depositions. So the focus has necessarily been on the  
21 Recovery and G2 time period. And -- because, first of all,  
22 about 60 or 70 percent of the cases in this MDL are Recovery  
23 and G2 cases, but more importantly, we're coordinating with  
24 the state court litigant and lawyers in getting that case  
11:37:37 25 ready for trial. So the focus has been in depositions on the

11:37:40 1 Recovery and G2.

2 And I'm glad Mr. Boatman made the point. The  
3 Recovery and G2 history, from the standpoint whether or not  
4 there should have even been these later devices, is all  
11:37:53 5 relevant to the later devices. It's not like we were only  
6 getting testimony in the Recovery and G2 and those are only  
7 going to be important in the Recovery or G2 case.

8 I mean, what happened with those cases as predicate  
9 devices and the process they went through to reach the later  
11:38:08 10 iterations are all going to be relevant in the later cases.

11 In the state court case that we're dealing with now,  
12 we just had Dr. David Kessler's deposition taken a week ago,  
13 former commissioner of the FDA, and his focus was on the  
14 Recovery and G2. His report only covers that.

11:38:32 15 So I just want Your Honor know that there's a lot of  
16 reasons beyond the fact we don't have all the documents that  
17 the plaintiffs' lawyers in this case have been focused on  
18 that, because all of the earlier remands that are before you,  
19 the ten cases, all Recovery and G2 cases.

11:38:46 20 The state court cases are -- likely have trial dates,  
21 maybe even before we get to the bellwether process here, all  
22 Recovery and G2 cases.

23 I may have misspoke. There may be one Eclipse case  
24 in the early remands. I can't remember. But we did -- we  
11:38:58 25 have covered the Eclipse cases in some of these depositions.

11:39:01 1 So I just think it's important for Your Honor to have  
2 a report on the fact that we are state and federal  
3 coordinating these the best we can. And we want to continue  
4 to do that. We don't want the state court litigants to say,  
11:39:15 5 Well, you're not getting the kind of discovery I want at the  
6 MDL, I'm going to go off and do my own. I don't think they  
7 want that either. But they certainly have the right to do  
8 that.

9 As a matter of fact, before the MDL, every state  
11:39:26 10 court case or federal court case that was filed independent of  
11 each other, they got to do their discovery over again. That's  
12 why there are some of these depositions.

13 One final point. They keep talking about 80  
14 depositions. 16 witnesses before the MDL were deposed, not  
11:39:39 15 80. Because they keep saying most were taken by MDL lawyers.

16 My law firm and other law firms that were involved in  
17 this litigation for the four years, three or four years before  
18 this MDL, 16 corporate depositions, witness depositions, were  
19 taken. So I wanted Your Honor to be aware of that as well.

11:39:59 20 Thank you.

21 THE COURT: Okay. Thank you.

22 MS. DALY: Your Honor, with respect to the special  
23 master issue that you inquired about, just to put this a  
24 little bit in perspective for you, the witnesses that are  
11:40:14 25 being deposed, most of those witnesses have never given a



11:40:18 1 deposition before. None of them are professional witnesses.  
2 Some of them are former employees that haven't worked for Bard  
3 as far as back as 2002. They're looking at documents they  
4 haven't seen in a decade. At depositions, they'll be handed  
11:40:33 5 30-page documents and asked to focus on one paragraph. But  
6 being careful people, they're taking time to look at  
7 depositions.

8 The plaintiffs then asked not simple questions,  
9 actually. They ask multipart questions that include  
11:40:47 10 assumptions or hypotheticals or references to documents of  
11 nonprofessional witnesses. It does take the witnesses  
12 sometimes a period of time to get through it, to ask for  
13 clarification, sometimes they answer in a lengthy narrative.

14 But the fact is they're not being asked yes or no  
11:41:08 15 simple questions. And I was glad to see the appendix that the  
16 plaintiffs submitted to you because even their appendix, which  
17 I assume they were trying to show bad nonresponsiveness, in my  
18 review of it, the answers are very often very responsive from  
19 the witnesses who were trying to do their best.

11:41:26 20 I have a couple of thoughts, having talked to my  
21 group about ways we might deal with this. The first way is  
22 simple. Both sides manages their attorneys and educates their  
23 attorneys better about what the problems have been.

24 The second opportunity is that we do an appendix with  
11:41:43 25 some clips -- the video clips are very important -- that are

11:41:46 1 similar to what they've done, and we sit down and meet and  
2 confer with a group of senior attorneys.

3 I've been taking depositions in this litigation both  
4 before and since the MDL for years, and I'm happy to be part  
11:41:59 5 of that team. I think we can meet and confer and have a  
6 discussion about what really is a nonresponsive question, what  
7 really is a good objection. There are lots of us who  
8 understand that, and I think we could do that.

9 Failing that being an acceptable way to do it, we  
11:42:17 10 could, in fact, pick a limited number of clips and excerpts  
11 from depositions and submit that to a special master to look  
12 at on his own time, soon, and to give us instruction via  
13 telephone before the next group of depositions. That would  
14 also be a way that we could do it.

11:42:34 15 I think the cost of having a special master sit  
16 there, somebody who has not seen the history of it, I think  
17 that is unwieldy and I think it's expensive, and I think we  
18 can as a group do better than that.

19 THE COURT: Okay.

11:42:49 20 MS. DALY: Thank you.

21 THE COURT: All right. As indicated, I want to think  
22 about these issues a bit. I will get an order out, if not  
23 today, probably on Monday.

24 Are there other points or issues people want to make  
11:43:11 25 or raise before we adjourn?

11:43:21 1 MR. STOLLER: No, Your Honor.

2 MR. LERNER: No, Your Honor.

3 THE COURT: Okay. All right. I'll get an order out.

4 We do need to schedule the next case management

11:43:31 5 conference, I think.

6 MR. LOPEZ: I'm sorry, I --

7 THE COURT: That's all right.

8 MR. LOPEZ: -- I thought you were asking about issues  
9 we've covered. There are a couple issues, if you don't mind.

11:43:40 10 THE COURT: All right.

11 MR. LOPEZ: As you know, we had an issue with a

12 deposition that we -- I think we're resolving, it's

13 Mr. Sullivan's deposition, and that was an issue where a

14 document that was -- may or may not have been related to the

11:43:58 15 Lehmann report was clawed back, and then we've since resolved  
16 that. You're aware of that.

17 The thing that's concerning us is that not happening  
18 again maybe with some other documents in the future, and one  
19 of the things that the defense said was that that document was  
11:44:16 20 not deemed produced in the MDL. In other words, that somehow  
21 or other it got -- it seeped into the MDL through some side  
22 door.

23 So I guess -- I think we need to have -- we've asked  
24 them for this, we need them to give us a list, and I'm sure  
11:44:35 25 they have it, so we don't run into this problem, of all

1 documents that they -- that were previously produced, in other  
2 words prior to the MDL, that they, quote, deem produced in the  
3 MDL.

4 If they would do that, I think it might have solved a  
5 lot of problems, especially at that last deposition, because  
6 that particular document was deemed produced in the MDL, but  
7 they took a different position about that.

8 So we've asked them for it. I don't know whether  
9 Your Honor thinks that's a good idea or whether or not you  
10 want to order they do it, but it would certainly help avoid  
11 this potential problem in the future if the plaintiffs knew  
12 exactly what it was that Bard was claiming are documents that  
13 were previously produced that were deemed produced in this  
14 litigation, because there were a lot of cases that were being  
15 litigated before this MDL.

16 That was the only point I wanted to bring to the  
17 Court's attention.

18 THE COURT: Hold on just a minute.

19 We addressed this issue early in the case. And in  
20 Case Management Order Number 2 after our initial case  
21 management conference, I said the parties will discuss whether  
22 agreement can be reached on the binding effect of already  
23 completed discovery and what effect it will have in cases  
24 filed after the date of the discovery. If the parties are  
25 unable to reach agreement they will -- are able, they will

11:47:17 1 jointly file a stipulation. If they're unable to reach they  
2 will each file 10-page memoranda.

3 Those memoranda were filed at dockets 375, 376, 411,  
4 and 415. And I assume I ruled on that issue. I don't have  
11:47:33 5 the order in my book addressing that specific issue, but does  
6 anybody here recall whether we talked about what was the  
7 effect of documents produced before the MDL?

8 MR. LOPEZ: Well, I think that's correct, and I think  
9 the issue is that they were deemed -- they would be deemed  
11:47:56 10 produced in the MDL. But there's an issue -- we're kind of  
11 working in somewhat in a vacuum because we're not sure whether  
12 or not our deemed produced is the same as their deemed  
13 produced, and I think we ought to figure that one out.

14 I mean, I don't want to show up at a trial with a  
11:48:16 15 document that we decided not to use at a deposition because we  
16 think it is a great impeachment document, and then I find out  
17 that that thing was never deemed produced prior to the MDL or  
18 in the MDL, and I've got to have a day hearing with you or  
19 another judge overseeing the case as to whether or not it  
11:48:33 20 violated some CMO or whether or not the document should have  
21 never been in my hands.

22 So, again, that happened at a deposition. So I want  
23 to avoid that problem occurring in the future, whether it be  
24 at a trial, at a deposition, filing a document in opposition  
11:48:52 25 or in support of a motion. I just think it should be

11:48:57 1 something both sides should have the exact same understanding  
2 as what documents -- and if there's an issue, then that's  
3 something we can bring before Your Honor, that -- you know, by  
4 the way, Judge, we have 50 exhibits or documents that are not  
11:49:10 5 on their list, and we'd like --

6 THE COURT: Well, that will happen when we prepare a  
7 final pretrial order. Each side will have its marked  
8 exhibits, so there will be objections.

9 But let's hear defense counsel's thoughts on this.

11:49:29 10 MR. LERNER: Your Honor, I think the issue that arose  
11 with that one document was this confusion as it related to the  
12 Lehmann report. So the attorneys at the deposition, there was  
13 some confusion about, well, that document was part of the  
14 privilege, the privileged document as part of the Lehmann  
11:49:45 15 report that you had ruled upon.

16 So that's one document in one deposition that has  
17 happened. That issue, I think, is clarified, and I can  
18 work -- make sure we're on the same page related to that one  
19 document. But otherwise, I don't think there has been any  
11:50:01 20 problems, nor do I expect there to be any problem. I think  
21 there was just that one problem of them having that document  
22 in the format it was, unredacted. I believe there was some  
23 confusion at the time about whether it was privileged or not.

24 THE COURT: Well, is it defendants' position that  
11:50:18 25 there are documents that were produced before the MDL that are

11:50:21 1 not deemed produced in this MDL, and therefore that plaintiffs  
2 cannot use in this MDL?

3 MR. LERNER: Your Honor, I do not know of any such  
4 documents. I think the only documents we would say is -- I  
11:50:35 5 can't think of anything. Only thing that comes to mind was  
6 the Lehmann report that was inadvertently produced. Other  
7 than that, I cannot think of any documents that are corporate  
8 documents that have been produced before the MDL that we would  
9 say are somehow not deemed produced in this MDL. I think that  
11:50:51 10 that was a unique circumstance relating to a privileged  
11 document, that there was some confusion about at the  
12 deposition.

13 THE COURT: Okay. I think that answers your  
14 question, doesn't it, Mr. Lopez?

11:51:01 15 MR. LOPEZ: I think so, Your Honor. I think there  
16 was an issue as to whether or not they were clawing it back  
17 because it wasn't deemed produced previously or they were  
18 clawing it back because of the Lehmann ruling.

19 So I'm happy with what I just heard, so let's just  
11:51:12 20 put it that way.

21 THE COURT: Okay.

22 You know, as far as the next conference goes, I think  
23 I want to pick that after I decide what we're doing with the  
24 schedule. I'm not sure where to set it today because I'm not  
11:51:28 25 sure what we're going to do with the schedule. So it will be

11:51:30 1 in the next two or three months in any event, but I think I  
2 want to look at whether there are milestones we ought to cross  
3 before we hold it. So I will just include that in the final  
4 order that comes out.

11:51:43 5 Okay.

6 MR. STOLLER: Might I make a suggestion on that,  
7 Your Honor?

8 THE COURT: Yeah.

9 MR. STOLLER: Regardless, it probably makes sense to  
11:51:49 10 have one in December. I know it's a tough time.

11 THE COURT: Oh, we'll definitely have one before the  
12 end of the year.

13 MR. STOLLER: Okay.

14 THE COURT: Okay. Thank you all.

11:51:57 15 (End of transcript.)

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C E R T I F I C A T E

I, PATRICIA LYONS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control, and to the best of my ability.

DATED at Phoenix, Arizona, this 24th day of October, 2016.

s/ Patricia Lyons, RMR, CRR  
Official Court Reporter